STATE OF MICHIGAN

IN THE SUPREME COURT

ON APPEAL FROM THE COURT OF APPEALS

RONALD G. SWEATT,

Plaintiff-Appellee,

vs.

STATE OF MICHIGAN,
DEPARTMENT OF CORRECTIONS,

Defendant-Appellant.
_____/

S.C. NO.: 120220

COA NO.: 226194

WCAC NO.: 99-0026

BRIEF ON APPEAL OF PLAINTIFF-APPELLEE

ORAL ARGUMENT REQUESTED

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COUNTER-STATEMENT OF QUESTIONS INVOLVED

I

IS MICHIGAN LAW CLEAR THAT FACTUAL DETERMINATIONS SUCH AS THOSE INVOLVED HEREIN - WHERE THE MAGISTRATE HAS MADE FINDINGS OF FACT REGARDING LIABILITY FOR WORKERS' COMPENSATION BENEFTIS AND WHERE THE APPELLATE COMMISSION HAS AFFIRMED SAME - ARE FINAL AND BINDING?

Plaintiff-Appellee says the answer is "Yes."

Defendant-Appellant says the answer is "No."

II

IF, ASSUMING, *ARGUENDO*, THIS COURT CONSIDERS A LEGAL ISSUE TO BE PRESENT, WOULD RESOLUTION OF THE LEGAL ISSUE RESULT IN A FAVORABLE DETERMINATION FOR THE PLAINTIFF?

Plaintiff-Appellee says the answer is "Yes."

Defendant-Appellant says the answer is "No."

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COUNTER-STATEMENT OF FACTS AND PROCEEDINGS

(Numbers in parentheses refer to pages of Defendant-Appellant's Appendix)

The proceedings described below were initiated upon the November 18, 1996 filing of plaintiff, Ronald G. Sweatt of an application for mediation or hearing, alleging as follows:

> "Applicant suffered very serious right knee injury requiring surgical intervention as a result of an inmate kicking applicant in the right knee. He has ongoing right lower extremity disability with respect to that injury. Benefits have been paid by the Accident Fund through approximately January, 1995. There was a period of incarceration and termination of benefits during the incarceration.
>
> Applicant seeks resumption of the weekly workers' disability compensation benefits due to the fact that he is no longer incarcerated. His incarceration ended July 22, 1996 and benefits should resume to that date. Any and all other benefits applicable under the Workers' Disability Compensation Act are sought as well." (Application -8a).

Plaintiff commenced employment with defendant Department of Corrections on June 2, 1986, as a correctional officer (9a). In that job, he had to supervise inmates, a task which involved breaking up fights and restraining prisoners (10a-11a).

Plaintiff was able to perform these duties until December 8, 1989, when he injured his right knee while breaking up a fight between inmates (13a). Defendant stipulated to the occurrence and work-relatedness of this injury (1b). Plaintiff subsequently underwent right knee surgery (15a), and still had problems with stair climbing, running and prolonged standing at the time of the hearing below (17a). As a result, he testified that he

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was not capable of returning to work as a corrections officer (17a). No contrary evidence was introduced or admitted below.

In defendant-appellant's Statement of Facts, it is asserted that: "pursuant to civil service regulations, plaintiff's imprisonment severed plaintiff's employment with defendant." This statement is not consistent with defendant's prior contention, nor with a fair reading of the prior proceedings. Defendant in its submission to the Appellate Commission April 13, 1999 asserted that plaintiff "was discharged from his employment with the Department of Corrections on November 19, 1991." (2b). This was during the more than five-year period that plaintiff was voluntarily paid workers' compensation benefits (18a). Although there was no direct evidence on the issue of a continued employment relationship after the injury (see the Appellate Commission's decision at 61a-62a), it is common for employers to terminate individuals from the employment rolls when their disabilities are, as in this case, of lengthy duration. As the Appellate Commission indicated:

> "At trial, the parties did not treat the case as though plaintiff was still employed at the time he entered prison. There was no debate as to his employment status. The few references to his status in the record point only to his non-employment." (62a).

Thus, the Appellate Commission concluded:

> "we do not deem plaintiff to have been still employed by the Department as of the time he began to serve his prison sentence" (62a).

Following his injury, plaintiff was paid workers' compensation benefits from December of 1989 through January 12, 1995 (18a). On the latter date, he was incarcerated

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after being convicted for delivery of heroin (18a). He was placed in a tether program on February 24, 1996, and was released altogether on June 1, 1996 (18a-20a).

During his incarceration, plaintiff was employed by Miller Industries as part of a work release program in a job that required him to handle only eight-ounce parts (19a,24a, 26a). He held that job from May of 1995 until July of 1996, after his actual release (19a-21a, 23a, 24a). At that time, he entered rehabilitation for 90 days after an overdose, and was told that his job would be held for him (23a). However, when he returned again in November, the job had changed drastically to require the handling of large, cast iron pieces and he was no longer capable of doing it (23a, 24a, 26a).

Plaintiff subsequently took on a paper route (26a). He held this job for about a year, but had to stop when the route changed and he was assigned an apartment complex that required climbing up and down stairs which was beyond his capability to perform (29a).

In July of 1998, plaintiff obtained a job with Pressure Vessel, Incorporated (30a). In this job, he worked with only light parts, and could sit a great deal of the time (32a). He was still in this job at the time of the hearing (32a).

Further testimony came from Joanne Bridgford, disability management coordinator for the Michigan Department of Corrections (37a). In that position, she coordinated the department's return-to-work program (37a).

Ms. Bridgford indicated that, prior to her tenure, which began in 1995, defendant had a policy that precluded a return to work for anyone who was not 100% fit for duty (37a-38a). However, this policy was changed at some date, about which Ms. Bridgford

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was uncertain, and she had subsequently returned various injured employees, 26 in all, to light work (37a, 39a). She explained the process as follows: "If a person comes to me with an injury, I have to look at what their work restrictions are, what their qualifications are, their geographic location, where we have vacancies. There's a whole bunch of different factors that go into returning them to work" (37a). Ms. Bridgford confirmed that, given these constraints, she was not always able to offer work, and she also acknowledged that it was tougher to place those with more stringent restrictions (42a-43a).

Ms. Bridgford testified that some positions that might be suitable for individuals with knee injuries included general office assistant, training officer, and word processing assistant (40a). However, she was not aware of any efforts that might have been made to return plaintiff to one of these or any other positions (41a).

In any event, Ms. Bridgford testified that a law was passed in 1996, which precluded the Department of Corrections from hiring an individual who had been convicted of a felony (40a). As a result, she indicated that: "he's on parole, and has been convicted of a felony, and there is a State law that prohibits Department of Corrections from hiring individuals who have been convicted of felonies." (Emphasis added, by Appellate Commission at 62a).[1]

[1] This new law, MCL 791.205a; MSA 23.2275a, precludes the Department of Corrections from hiring anyone who has been convicted of a felony prior to its March 25, 1996 effective date, but also expressly excludes from its reach those employed before it took effect. Judge Neff, in her opinion, correctly points out that there is an issue of applicability of this provision assuming that plaintiff was still an employee at the applicable time. As the Appellate Commission pointed out in its earlier decision, however, "the context of this suggests that plaintiff was no longer employed by the Department of Corrections at the time of his imprisonment." (62a) Further, the Appellate Commission noted that the "plaintiff stopped working for the Department in late 1989, his fringe benefits were subsequently terminated, he never returned to the Department, and he entered prison six years after last performing work for the Department." Appellate Commission decision February 29, 2000, at 62a.

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The hearing in this matter was conducted before Magistrate L'Mell M. Smith on November 18, 1998. At the close of proofs, in a decision mailed from the Bureau on December 9, 1998, Magistrate Smith ordered the resumption of plaintiff's benefits, effective June 1, 1996. The magistrate found that plaintiff "continued to suffer a disability which inhibits his ability to earn wages as the result of the knee injury inflicted in the course of his employment with the Department of Corrections." (50a). The magistrate further held that there was no authority for the withholding of plaintiff's benefits once he was no longer incarcerated.

Defendant appealed from this determination. The Appellate Commission initially, on November 22, 1999, remanded the matter to the magistrate to determine "whether defendant Department of Corrections would have made an offer of reasonable employment to plaintiff were it not for the statutory prohibition against employment of any individual who has been convicted of a felony." (52a)

The magistrate issued her remand decision on January 11, 2000. The magistrate reviewed the testimony and indicated that there was no evidence plaintiff had been offered any kind of favored work during his time off. This, together with the remainder of the record, convinced the magistrate that there was no basis to conclude that the State would have offered a job to Mr. Sweatt (54a-57a).

The Appellate Commission, which had retained jurisdiction, then reviewed the magistrate's conclusion and by a 4 – 3 decision affirmed the decision of the magistrate.

The majority pointed out "whether an offer of reasonable employment would have been made is a factual inquiry to be made by the magistrate." (68a). The Appellate

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Commission majority stated that the magistrate's finding that defendant would not have made an offer of reasonable employment was "supported by competent, material, and substantial evidence on the whole record" (68a). Thus, the Appellate Commission majority held that "as a matter of law defendant Department of Corrections did not meet the burden of proof placed on an employer to avoid payment of compensation under the 'commission of a crime' provision in Section 361(1)" (68a-69a).

The majority pointed out that the record was clear that "plaintiff did not refuse employment, nor can his actions in committing a crime be viewed generally as a decision to withdraw from the workplace for those periods after he had served the appropriate amount of time in prison for his criminal conduct" (69a).

Thus, the Appellate Commission affirmed the decision of the magistrate granting an open award of benefits based on the right knee disability. Defendant then sought and obtained leave to appeal to the Court of Appeals. On September 25, 2001, the Court of Appeals issued its decision in this matter. The Court of Appeals, by majority decision, upheld the determination of the Appellate Commission that plaintiff was entitled to resumption of workers compensation benefits after the completion of his prison sentence. Judges Neff and White had different legal rationales for affirming the result arrived at by the Commission. Judge Neff carefully examined the statutory framework of both the Worker's Disability Compensation Act and the Department of Corrections. Judge Neff pointed out that:

> "The WDCA provides for suspension of disability benefits 'for such periods of time that the employee is unable to obtain or perform work because of imprisonment or commission of a crime." MCL 418.361(1). Under the express language of Section 361, plaintiff's

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> disability benefits are suspended only during the period that he is "unable to obtain or perform work." When plaintiff sought reinstatement of his benefits following his release from incarceration, he could work, and had, in fact, been working within his limitations. Plaintiff remains disabled, he is no longer disqualified from receiving benefits by reason of Section 361, and there was no offer of reasonable employment to bring the provisions of subsection 301 (5)(a) into consideration. He is entitled to benefits under the WDCA." (80a-81a).

On the other hand, Judge White's decision supporting reinstatement of the benefits was based upon the factual analysis directed by and affirmed by the Appellate Commission. Judge White points out that the Appellate Commission:

> "concluded that the magistrate had not erred in concluding that there was insufficient factual support for the underlying premise that were it not for plaintiff's status as a convicted felon, defendant would have offered reasonable employment to plaintiff. The WCAC dissenters and the dissent here view that approach as illogical, and subjecting defendant to a 'Catch-22.' I disagree." (Concurring opinion - 84a)

Judge White went on to state that the WCAC majority:

> "rejected the concept of an absolute disqualification of benefits without regard to whether the DOC was in fact deprived of the mitigation defense offered by the WCDA's section 301 (5)(a), pertaining to the offer of reasonable employment. I find no error in this reasoning." (Concurring opinion at 84a)

Judge Griffin dissented from the majority view that the Appellate Commission's determination should be upheld. His view was that the DOC statute created a bar to employment, and that Section 361 of the WCDA established that benefits were not owed by defendant.

From the September 25, 2001 Court of Appeals Decision, defendant-appellant sought leave to appeal to this Honorable Court on October 15, 2001. On April 30, 2002, this Honorable Court granted defendant's Application for Leave to Appeal (92a).

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ARGUMENT

I

WHERE THE MAGISTRATE HAS MADE FINDINGS OF FACT REGARDING ELIGIBILITY FOR WORKERS' COMPENSATION BENEFITS AND WHERE THE APPELLATE COMMISSION HAS AFFIRMED THESE DETERMINATIONS, MICHIGAN LAW IS CLEAR THAT THESE DETERMINATIONS ARE FINAL AND BINDING.

Under MCLA Section 418.861, the Michigan Legislature has stated that:

> "The findings of fact made by the Board acting within its powers, in the absence of fraud, shall be conclusive. The court of appeals or supreme court shall have power to review questions of law involved in any final order of the board, if application is made by the aggrieved party within 30 days after such order by any method permissible under rules of the courts of the laws of this state."

Thus, this Honorable Court in *Michales v Morton Salt Co*, 450 Mich 479 (1995), has held that:

> "[R]eview by the Court of Appeals or this Court is limited because 'findings of fact made by the WCAC are conclusive if there is any competent evidence to support them.'"

What the defendant-appellant fails to indicate to this Honorable Court is that this case is largely undisputed. The undisputed aspects of this case certainly indicate the appropriateness of the determination to award workers' disability compensation benefits to Mr. Sweatt. The other thing that has not been made evident through defendant-appellant's brief is that the remaining minor issue in the case is a factual one which has been resolved by the magistrate and affirmed by the Appellate Commission with the determination that there was a proper factual conclusion that defendant would not have made an offer of reasonable employment to Mr. Sweatt regardless of the fact that there

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was a change of law after 1995 that made hiring of some felons (not necessarily including plaintiff – see discussion footnote 1) impossible.

Initially, the Court should be informed of the agreed-upon elements of this case. There is no dispute that Mr. Sweatt has suffered a very serious right knee injury in the course of his employment as a prison guard as he attempted to break up a fight in December of 1989. He had significant medical treatment and surgery, but was left with a serious permanent residual disability affecting the right knee. Benefits were paid to Mr. Sweatt from 1989 through January 1995.

Although no direct evidence was entered at trial regarding Mr. Sweatt's employment status with the State of Michigan, the defendant has asserted in its brief to the Appellate Commission that plaintiff's employment was terminated on November 19, 1991 (2b). The reason this observation is made is because the defendant states in its brief to this Court (on page 9) that: "once plaintiff was convicted and imprisoned for delivery of heroin, his employment with defendant automatically terminated." Since his employment appears to have been terminated long before this and while plaintiff was still receiving workers' compensation benefits, the statement in defendant's brief to this Court is erroneous. See discussion of this in plaintiff's Counter Statement of Facts and Proceedings.

No efforts of any kind were ever made during the time workers' compensation benefits were being paid, or any subsequent timeframe, to attempt to return Mr. Sweatt to any kind of employment with the Department of Corrections. Benefits were terminated at that point only because Mr. Sweatt had been convicted of a felony and had been

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incarcerated. The employee is not seeking benefits for the period of time that he was incarcerated, but ultimately sought to have his workers' compensation benefits reinstated once he had been released from prison. That is the determination that eventually was made in a favorable manner to Mr. Sweatt. Thus, the issue essentially is whether Mr. Sweatt was entitled to have a reinstatement of his workers' compensation benefits after having served his time in prison.

The Appellate Commission had initially reviewed this matter and questioned the applicability of Section 361 and in its November 22, 1999 order of remand, directed the magistrate to make a finding based on the existing record whether "defendant Department of Corrections would have made an offer of reasonable employment to plaintiff were it not for the statutory prohibition against employment of any individual who has been convicted of a felony." (52a).

The magistrate reviewed the matter pursuant to the directive and concluded that there was no evidence to support a conclusion that a job offer would have been made to Mr. Sweatt. The Appellate Commission majority reviewed this decision and pointed out that "plaintiff did not refuse employment, nor can his actions in committing a crime be viewed generally as a decision to withdraw from the workplace for those periods after he had served the appropriate amount of time in prison for his criminal conduct." (69a). The Appellate Commission majority also ruled that "as a matter of law defendant Department of Corrections did not meet a burden of proof placed on an employer to avoid payment of compensation under the 'commission of a crime' provision in Section 361(1)" (68a-69a). The magistrate's findings of fact on these issues, as well as the affirmance by the

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Appellate Commission, relate to factual issues which are solely within the jurisdiction of the magistrate and the Appellate Commission to determine.

Judge Helene White points out the nature of the factual determination made by the Appellate Commission:

> "The WCAC majority did not conclude that defendant must actually offer the prohibited employment. Rather, it determined that in any given case, in order for the DOC statutory bar on employing felons to render WCDA section 361(1) applicable, there must be a factual finding that the DOC bar actually prevented the DOC from offering reasonable employment, i.e., that the DOC in fact had an open position constituting reasonable employment that plaintiff could have performed, and that it would have offered such employment had the bar not been in effect. Stated differently, the WCAC majority rejected the concept of an absolute disqualification of benefits without regard to whether the DOC was in fact deprived of the mitigation defense offered by the WCDA's section 301(5)(a), pertaining to the offer of reasonable employment. I find no error in this reasoning." (emphasis added, 84a).

As Section 861 indicates, this Honorable Court does not have jurisdiction to review factual matters. See also, *Mudel v Great Atlantic & Pacific Tea Co*, 462 Mich 691 (2000) for the Supreme Court's recent analysis of the standards for review in workers' compensation matters. Thus, it is respectfully submitted that this Honorable Court should affirm the determination made by the Court of Appeals.

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ARGUMENT

II

IF, ASSUMING, ARGUENDO, THIS COURT CONSIDERS A LEGAL ISSUE TO BE PRESENT, IT IS RESPECTFULLY SUBMITTED THAT THE RESOLUTION OF THE LEGAL ISSUE WOULD RESULT IN A FAVORABLE DETERMINATION FOR THE PLAINTIFF.

Under Section 361 of the Workers' Compensation Act, it is provided that:

> "Compensation shall be paid for the duration of the disability. However, an employer shall not be liable for compensation under Section 351, 371(1), or this subsection for such periods of time that the employee is unable to obtain or perform work because of imprisonment or commission of a crime."

Defendant contends that because it is allegedly unable to provide plaintiff with a job after his felony conviction, his commission of a crime should relieve it of liability for payment of workers' compensation benefits.

As we have previously pointed out, the defendant must realize that it is necessary to give effect to the entirety of the statute rather than to pick out snippets that it hopes will provide a basis for denying compensation benefits. Thus, in *Baker v General Motors Corp.*, 409 Mich 639 (1980), this Honorable Court stated that "every word of a statute should be given meaning and no word should be treated as surplusage or rendered nugatory if at all possible." (*Baker, supra* at 665).

A. Plaintiff Is Able To Obtain Or Perform Work

While the statute in question does refer to both incarceration and the commission of a crime, it also limits it applicability to those claimants who are unable to obtain or perform work as a result of either of those events. Certainly the class of individuals who

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are "unable to obtain or perform work because of imprisonment or commission of a crime" does not include Mr. Sweatt after he was discharged from prison. Instead, Mr. Sweatt has held several jobs since his incarceration ended and was employed at the time of the hearing. He worked for Miller Industries (19a-20a,23a,24a), had a paper route with the Jackson Citizen Patriot (26a-27a) and was employed by Pressure Vessel, Inc. at the time he testified below (30a,32a).

As a result, plaintiff's commission of a crime has not rendered him "unable to obtain or perform work . . ." That being so, Section 361(1) is not applicable to him by its very terms. When a similar argument was raised by the defendant in *Weathersby v City of Grand Rapids*, 1992 Mich ACO 111 (1992 ACO #35), the Appellate Commission rejected it because the plaintiff still remained able to obtain or perform work elsewhere:

> "According to defendant, though, since its rules and policies preclude offers of work to those charged with felonies, plaintiff, because of commission of a crime, is unable to obtain and perform work. Plaintiff however, is limited only by her work-related physical impairment. It is defendant that would dispense with her services in some capacity accommodating her limitations. Moreover, even if *defendant's* rules and polic[i]es could be held to render *plaintiff* unable to obtain or perform work for it, that is not to say that she is unable, because of a commission of a crime, to obtain or perform work elsewhere." (*Weathersby, supra* at 112-113).

Of course the same is true here. Not only is the plaintiff able to obtain or perform work, but he has performed work and was employed at the time of the hearing below. The statutory bar therefore, simply does not apply to plaintiff.

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B. Permanent Forfeitures Disfavored

It is to be noted that in a recent case, *McJunkin v Cellasto Plastic Corp.*, 461 Mich 579 (2001), the Court was there dealing with whether an unreasonable refusal of favored employment should generate a permanent forfeiture of workers' compensation benefits. Obviously, as we have indicated above, there has not been a refusal of employment by this plaintiff. Quite the contrary. However, this Court pointed out meaningfully in the *McJunkin, supra* case that, "there is no provision in the WDCA for an employee's permanent forfeiture of benefits as a result of unreasonably refusing an offer of reasonable employment." It is to be noted that essentially the defendant in this case is arguing for a permanent forfeiture of benefits. This is not consistent with the plain meaning of the section that it refers to nor is it consistent with the overall intent of the workers' compensation laws, which are to be construed in a humanitarian and socially progressive manner.

In *Haske v. Transport Leasing, Inc.*, 455 Mich 628, 660-1 (1997), this Honorable Court dealt with the issue of eligibility for workers disability compensation benefits under Section 301. It is worthwhile to examine the language used in that case as it evidences the Court's conclusion that a compensable disability exists even though there may be other possible reasons that a person is not working in addition to a work-related disability:

> "Plaintiff need not prove what he is theoretically 'able to earn' after the injury, *that other factors are not the cause of his unemployment,* or that the amount of residual capacity is diminished. If the magistrate credits testimony that there is a direct link between wages lost and a work-related injury, plaintiff need not prove anything in addition." (emphasis added)

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Further, the *Haske* court identified the factors for establishing compensability as follows:

> "In summary, absent clear Legislative direction to the contrary, we conclude that for an employee to carry his burden of proving an impairment of wage-earning capacity, he must prove (1) a work-related injury, (2) subsequent loss in actual wages, and (3) that the injury caused the subsequent wage loss. Where the employee has carried his burden of proving wage loss, he will, as a practical matter, have proven that he is unable to perform a single job within his qualifications and training, and, therefore, that he is disabled." 455 Mich 628 at 661

Although *Haske* is dealing with Section 301 instead of Section 361, it clarifies the intent that workers compensation is remedial, social legislation and should be interpreted in a manner to effectuate those goals.

Judge Neff pointed out in her analysis of the dissenting opinion of Judge Griffin the appropriate legal analysis:

> "The dissent reasons that no benefits are owed '[b]ecause plaintiff is unable to work for defendant due to his commission of a felony, MCL 791.2051' under the plain language of subsection 361(1). Even if the DOC statute applied to bar plaintiff's employment with defendant, I could not concur with this result. There is no basis in subsection 361(1) for such specific application to defendant, and I will not read such language into the statute. See *McJunkin, supra* at 598. The fact that *defendant* cannot rehire plaintiff does not render plaintiff ineligible for benefits under the language of subsection 361(1). The test is not whether an employee is unable to work for the previous employer, but rather merely whether 'the employee *is unable to obtain or perform work* because of ... commission of a crime.' The record is clear that plaintiff is not unable to obtain or perform work for that reason."

C. Defendant Has An Employment Policy That Prevents Its Potential Ability To Mitigate Damages, But This Simply Means That Workers' Compensation Benefits Are To Be Paid

There is reference in the Court of Appeals decision relating to the defendant's ability to mitigate its damages. Certainly, it is generally the case that if a worker has

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could occur to this class of individuals through the strained reading that the defendant proposes. As an example, an employer could establish a policy that it will not employ misdemeanants. Thus, a person convicted of a minor crime such as simple assault could be deprived of payment of workers' compensation even where, as in this case, the evidence is clear that there has been a major physical disability as a result of a work injury.

To the extent that defendant is arguing that plaintiff has somehow constructively refused employment with the State government, even though he was no longer on the rolls of the employer and where no offer of employment ever occurred, the recent cases of *Russell v Whirlpool Financial Corp.* 461 Mich 579 (2000); *McJunkin v Cellasto Plastics Corp.*, 461 Mich 590 (2000); *Perez v Keeler Brass Co.*, 461 Mich 602 (2000) have applicability.

As Judge Neff pointed out in her extensive review of these cases, "the WDCA does not provide for *permanent* forfeiture of benefits as a result of unreasonably refusing an offer of reasonable employment." (Emphasis in original) Judge Neff emphasizes:

> "There is no provision in Section 361 or elsewhere in the WDCA for the permanent forfeiture of benefits because of imprisonment or commission of a crime, and plaintiff in this case cannot be said to be unable to obtain or perform work for these reasons. As pointed out by the WCAC majority opinion, 'plaintiff did not refuse employment, nor can his actions in committing a crime be viewed generally as a decision to withdraw from the workplace for those periods after he had served the appropriate amount of time in prison as punishment for his criminal misconduct.' In other words, it was plaintiff's behavior that led to the suspension of his benefits, but plaintiff did everything necessary under the WDCA to restore his entitlement to benefits. Therefore, focusing on the conduct of plaintiff, and the statutory language referencing a time period of limited duration, as *Russell, McJunkin* and *Ramon*

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> *Perez* instruct, it is clear that under the WDCA plaintiff is entitled to reinstatement of disability payments based on his continued disability." (Court of Appeals at page 79a)

D. Applicability of Another Section of the Workers' Compensation Act As Evidence of Legislative Intent

Finally, the Court should realize how the workers' compensation statute operates in a situation where the claimant has engaged in egregious behavior at the employer and suffered injury as a result. Section 418.301(10) provides that:

> "(10) Weekly benefits shall not be payable during the period of confinement to a person who is incarcerated in a penal institution for violation of the criminal laws of this state or who is confined in a mental institution pending trial for a violation of the criminal laws of this state, if the violation or reason for the confinement occurred while at work and is directly related to the claim."

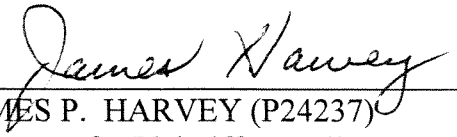
This provision would suspend, not permanently forfeit, benefits where an employee was involved in a criminal act in the course of employment and suffered a disabling injury as a consequence. If the Legislature was satisfied with a suspension of benefits in 301(10), why would the Legislature require a forfeiture of benefits to an individual such as plaintiff, who has sustained a serious right knee disability, has received workers' compensation for more than 5 years, was terminated from the employment rolls during that period of time, and subsequently was imprisoned (during which time benefits were appropriately suspended) and then was released from custody? Logically, plaintiff-appellee herein should be subject to no more than the suspension of benefits during incarceration, consistent with the analysis described above.

RELIEF

For the reasons identified in this brief, as well as the majority decision of the Appellate Commission and the Court of Appeals determination and any other reasons consistent with the record, the plaintiff respectfully requests that this Court affirm the determination made below.

Respectfully submitted,

KELMAN, LORIA, WILL
HARVEY & THOMPSON

BY: 

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STATE OF MICHIGAN

IN THE SUPREME COURT

ON APPEAL FROM THE COURT OF APPEALS

RONALD G. SWEATT,

Plaintiff-Appellee,

vs.

STATE OF MICHIGAN,
DEPARTMENT OF CORRECTIONS,

Defendant-Appellant.

S.C. NO.: 120220

COA NO.: 226194

WCAC NO.: 99-0026

PROOF OF SERVICE

RUTH E. HARVEY certifies that **Brief of Plaintiff-Appellee** and **Plaintiff-Appellee's Appendix** were served upon **Gerald M. Marcinkoski, Attorney for Defendant-Appellant, State of Michigan, Department of Corrections, 600 S. Adams Road, Ste. 300, Birmingham, MI 48009- 2 copies and one copy to Jennifer Granholm, Attorney General, P.O. Box 30212, Lansing, MI 48909 and one copy to Thomas Casey, Solicitor General, P.O. Box 30212, Lansing, MI 48909** on **July 25, 2002**, by First Class U.S. Mail.

Ruth E. Harvey

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